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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. NICHOLAS CENISEROS ESPINOZA, Defendant and Respondent.	E029545 (Super.Ct.No. FVI011054) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. J. Michael Welch, Judge. Order reversed; remanded for further proceedings.

Dennis L. Stout, District Attorney, Grover D. Merritt, Lead Deputy District Attorney, and Mark A. Vos and Lance A. Cantos, Deputy District Attorneys, for Plaintiff and Appellant.

Alemayehu G. Mariam, under appointment by the Court of Appeal, for Defendant and Respondent.

Defendant pled guilty to one count of commercial burglary (Pen. Code,[1] § 459) and one count of petty theft with a prior (§ 666), and he admitted allegations of two prior strike convictions (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)) and a prior prison term (§ 667.5, subd. (b)). The trial court dismissed one of the prior strike findings and sentenced defendant to eight years and four months in prison. The People appeal the trial court's dismissal of the strike finding. We agree the trial court abused its discretion in dismissing the finding and reverse the order.

In dismissing the prior strike finding, the trial court spoke at length. Recognizing it had to determine "under the dictates of the *Romero* case, the *Williams* case, of whether or not [defendant] falls within the spirit of the three strikes law," the trial court stated defendant was "a life long heroin addict . . . start[ing] with glue sniffing back when he was about 18 or 19 years old . . . [¶] [and] graduated into . . . heroin. . . . As a result of that, he . . . commit[ed] theft-related offenses.

"He was on and off methadone. . . probably conducted through rehab programs. . . . So he's probably been involved in some kind of rehab type programs. . . .

"He said that all the methadone program did for him was to change him from one drug to another because he then became dependent on methadone. So I think I can safely say . . . that his involvement in the courts [has] been directly related to the usage of drugs.

"The probation officer in his report in 1991 to Los Angeles County states [defendant] is an admitted drug addict, and it would appear that the defendant's behavior in

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[1] All statutory references are to the Penal Code unless otherwise indicated.

. . . the robbery case, was a direct result of this drug addiction, and that is what is reflected by his whole life.

"His 1980 case . . . involved a robbery, a theft-related robbery, and he was tried on probation . . . with a year in the county jail, and [in] his 1991 case, he was given seven years, and that was for a robbery conviction plus a seven year or five year enhancement for a conviction of a prior serious or violent felony offense, . . .

"At that time, the Court took into consideration his prior robbery and punished him for that. That particular case involved the co-part[ner] having a gun apparently, and then abandoning the defendant along with the victim when the police arrived. . . .

"He was sent to prison on that case. He was paroled in '94, and . . . he went back for five months on a parole violation and went back for a dirty test on at least one occasion.

"[S]ince his release in '94, other than those things, he has remained arrest free up until this particular offense, and I think that placed [*sic*] upon me more so than anything else in this sense.

"He's a drug addict. He's on methadone. Yet he has been able to maintain, and maintain for some considerable length of time on the outside, arrest free. That is with the exception of this particular case. This particular case is the theft of a . . . [¶] . . . cordless phone. . . . [I]t's a petty theft. . . . That is less than $400, possibly a burglary charge. . . .

"In any event, and this occurs at apparently the period of time in his life when he has had, in effect, attempted to, and has been somewhat successful in making a change. There is nothing to indicate other than the two incidents, the 1980 case and a 1991 case, that he's a

violent person. I don't see batteries in here. I don't see conscious acts of violence towards other persons.

"I see theft, and I see some drug-related offenses. I'm not saying that thefts aren't serious or a serious offense. By their very nature, a burglary is a violent offense. . . . This particular case he did have a razor blade with him, but apparently the razor blade was used to remove the price, the sticker from the article that was stolen.

"So I don't really consider this to be a violent offense as such. . . . Therefore, in my opinion, based upon his record, based upon the reason why he's here, that is drug addiction, factors that indicate to me that he is not within the spirit of the three strikes law. So the question then becomes in my mind, what would be the appropriate sentence for a person that obviously knows better, that obviously has been before these court's [*sic*] before?

"In fact, since he was 19 years old, he was before the courts, and probably even before that in juvenile hall. Although, we don't have that in front of us. So he does know better. The Court feels that, though, taking into consideration all of these factors, that it is appropriate, and I will strike one of the strikes, the 1980 strike, the one that occurred 21 years ago, and for the reasons that he is not within the spirit of the three strike[s] law.

"I'll order that the minutes of the Court reflect that the reason for that is that he is a life long heroin addict. He had remained, for all practical purposes, arrest free for some seven years, or for some six years before committing this particular offense, was employed . . . [¶] . . . was in a fashion of not only supporting his habit, but probably supporting a family, and was attempting to maintain through methadone. There is no indication of prior acts of violence up until this particular crime. This particular crime is one of a petty theft,

and based upon those factors, and the Court will find that in the interest of justice demand that I will strike one of the prior convictions."

Section 1385, subdivision (a), authorizes a trial court to strike prior conviction allegations and/or findings in cases brought under the three strikes law. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) However, a "court's discretion to strike prior felony conviction allegations in furtherance of justice is limited." (*People v. Superior Court (Romero), supra*, 13 Cal.4th 497, 530.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

On appeal, the People challenge the trial court's determinations that defendant had no prior acts of violence, had been arrest free for six years, and was employed to support his habit and his family when he was arrested. Agreeing with the trial court's determination that defendant was a lifelong heroin addict, they argue that is an aggravating rather than a mitigating factor.

As the People argue, the trial court's finding "[t]here is no indication of prior acts of violence up until this particular crime" is not supported by defendant's record. In

November 1980, he was convicted by his guilty plea in Los Angeles Superior Court case No. A526284 of robbery with personal use of a knife. In January 1991 in Los Angeles County case No. KA006692, he pled guilty to committing a robbery in which his accomplice pointed a revolver at the victim's stomach. Also, the probation report prepared in connection with his 1979 attempted burglary conviction (§§ 664/459) stated the officers found a knife on the front floorboard, a pair of bolt cutters on the rear floorboard, a CO2 pellet pistol in the glovebox and two screwdrivers in the rear seat of his car. It thus appears that while his conviction does not reflect that he engaged in any violent acts, the circumstances surrounding the attempted burglary suggest he was prepared had the need arisen. In the current case, he had "a razor blade in his right hand" when the armed officers arrested him. At that time he was standing in the parking lot with the phone under his shirt after exiting Rite Aid without interference. Thus, it is questionable whether his possession of the razor blade was for the limited purpose of removing the price tag from the phone as the trial court stated.

The finding that defendant had been arrest free for six years also lacks support. Defendant was paroled in 1994 and violated parole in 1996. He admitted to two separate parole violations between 1994 and the current crimes and was taken into custody on both violations. He was discharged in January 1998 and committed the current crimes in January 2000. In *People v. Williams*, *supra*, 17 Cal.4th 148, 163, the Supreme Court found "not significant" the fact that 13 years passed between the prior serious and/or violent felony convictions and the current felony because Williams did not refrain from criminal activity during that span of time. *People v. Gaston* (1999) 74 Cal.App.4th 310, 321, also found the

remoteness of the priors was not significant where the defendant had not led a legally blameless life in the interim. Here, since defendant was taken into custody twice between 1994 and January 12, 2000, when he committed his current crimes, he did not lead a legally blameless life in the interim and he was not arrest free for six years as the trial court found.

The finding defendant was employed to support his family when he was arrested is also without support. While defense counsel informed the court that defendant was employed as a truck driver working with his brother, defendant told the probation officer he was "self employed with another individual in the recycling business." Defendant said he made "$50.00 to $75.00 a day in the recycling business. That was how he fully supported his habit." He also told the probation officer that "from November 2000 up until the time of his arrest, . . . his [heroin] habit was about $50.00 a day." He did not claim he supported his wife and children. Rather, "His wife, Candeleria Sandoval, is employed in the cafeteria at Liberty Elementary School . . . ." There is nothing in the record showing that defendant worked with his brother, drove a truck or contributed to the support of his family. Nor does the record reveal the presence of any supportive family member, friend or employer at any of the proceedings in this case.

The trial court's finding defendant's criminal career was a direct result of his drug addiction appears to be supported by the record. It indicates a conviction for inhalation/possession of toluene (§ 381) in March 1976 and probation reports prepared in connection with subsequent nondrug-related offenses disclose continued drug use. The record also reveals the following criminal history: In August 1976, defendant was convicted for attempted burglary (§§ 664/459) and committed to the California Youth

Authority. In December 1976 he pled guilty to petty theft (§ 484) and was placed on 12 months' probation. In October 1979, he pled guilty to attempted burglary (§§ 664/459) and was placed on probation. In November 1980, he pled guilty to robbery with personal use of a knife (§§ 211, 12022, subd. (b)) and was placed on three years' probation. In January 1981, he violated probation and was sentenced to the aggravated prison term. In March 1989, he pled guilty to petty theft (§ 490.5) and was placed on 12 months' probation. In September 1989, he pled guilty to being under the influence (Health & Saf. Code, § 11550) and served 90 days in county jail. In April 1990, he pled guilty to being under the influence (Health & Saf. Code, § 11550) and possessing burglary tools (§ 466) and was placed on two years' probation. In January 1991, he pled guilty to robbery and admitted a prior serious felony conviction for which he was sentenced to state prison for seven years. The probation report prepared in connection with the 1991 robbery stated defendant admitted he was addicted to heroin and had used the drug for approximately 15 years. He said he had a habit that cost him between $300 and $350 per day. He was in the methadone program in 1974 and again in 1988 and "all the methadone program did for him was change from one drug to another because he became dependent on methadone." From approximately May 2000 through November 2000, he was on methadone. However, from November 2000 until he was arrested on January 12, 2001, he was using about $50 of heroin a day. In these circumstances, we conclude that defendant's drug dependency does not fall into the category of mitigating circumstances.

Defendant's record, like that of the defendant in *Williams*, does little to recommend him. It reveals a lack of remorse as demonstrated by his statement to his probation officer

that he had not stolen the cordless phone despite his earlier admission and his guilty plea. It reveals an inability or unwillingness on his part to abide by the laws of society. Several stays in prison, violations of parole and the recurrence of crime indicate that he is a threat to society. While, as the trial court concluded, his dismissed strike was about 21 years old, he routinely committed crimes during those 21 years, except for the periods he was incarcerated. And, contrary to the trial court's conclusion, some of the crimes involved violence. While consideration of the length of the sentence imposed--here, eight years and four months--is appropriate in determining a defendant's prospects for committing future crimes (*People v. Gaston, supra*, 74 Cal.App.4th 310, 315), defendant's past record provides no reason to be optimistic and his heroin habit paints a dismal picture of his prospects.

Defendant's reliance on *People v. Bishop* (1997) 56 Cal.App.4th 1245 and *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968 is misplaced. *Bishop* predates *People v. Williams*, *supra*, 17 Cal.4th 148, and consequently did not apply the appropriate standard: whether the defendant should be deemed to fall outside the scheme's spirit. Instead, the *Bishop* court indicated the nature of the present crime and the remoteness of the defendant's prior violent offenses operated to mitigate his three strikes sentence. However, the three strikes law provides "[t]he length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence." (§ 667, subd. (c)(3).) Thus, remoteness does not take a defendant outside the spirit of the very law that expressly rejects remoteness as a basis for avoiding the law.

Also, *Bishop* relied heavily on the state Supreme Court's decision in *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th 968, for the scope of the trial court's right to exercise its discretion. But the *Alvarez* court addressed a different issue with a different scope of discretion: the trial court's unqualified discretion to determine whether to reduce a wobbler to a misdemeanor for purposes of the three strikes law. And it contrasted that discretion with the qualified discretion at issue here under section 1385, subdivision (a), which, it acknowledged, was an example of a statute that "contain[ed] express qualifications delineating, and thereby restricting, the particular exercise of discretion." (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th 968, 977.)

Finally, we are guided by *People v. Strong* (2001) 87 Cal.App.4th 328, and *People v. Gaston, supra,* 74 Cal.App.4th 310. *Strong* held that a trial court had abused its discretion under *Romero* when it concluded a career criminal was outside the spirit of the three strikes law. "[A] defendant who falls squarely within the [three strikes] law's letter does not take himself outside its spirit by the additional commission of a virtually uninterrupted series of nonviolent felonies and misdemeanors over a lengthy period. . . . [That] law was devised for the 'revolving door' career criminal, and was expressly intended 'to ensure longer prison sentences . . . for those who commit a felony' as long as they were previously convicted of at least one strike. . . . Extraordinary must the circumstance be by which a career criminal can be deemed to fall outside the spirit of the very statutory scheme within which he squarely falls and whose continued criminal career the law was meant to attack." (*People v. Strong, supra,* 87 Cal.App.4th 328, 331-332, fns. omitted.) "[T]he overwhelming majority of California appellate courts have reversed the dismissal of, or

affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career." (*People v. Strong, supra,* 87 Cal.App.4th 328, 338.)

In *People v. Gaston, supra,* 74 Cal.App.4th 310, the defendant was "a 44-year-old homeless person who 'has been unemployed for the past five years,' has passed 'most of the past eight years in state prison or on parole' and 'has spent most of his life on the street . . . .' Although 'drug use appears to be an underlying factor in [his] criminal behavior, and in fact may be the root cause thereof,' the record is barren of any attempts by [him] to 'root out' such destructive drug dependency. . . . [¶] . . . [¶] [H]e has committed an unending series of felonies, as well as other crimes, has been repeatedly punished for these crimes, including the service of four prior prison terms, and has failed to learn anything from the experience." (*People v. Gaston, supra,* 74 Cal.App.4th 310, 322.) Here, too, defendant has failed to "root out" his destructive dependency, has committed an unending series of crimes, has been repeatedly punished for these crimes, including probation and prior prison terms and has failed to learn anything from the experience. Consequently, he is clearly within the spirit of the three strikes law. Thus, the trial court abused its discretion when it dismissed one of defendant's prior strike convictions and imposed sentence.

DISPOSITION

The order dismissing defendant's 1980 strike is reversed. The matter is remanded to the trial court for further proceedings.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

GAUT
J.